NO. 48833-7

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DEDRIC GREER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stanley J. Rumbaugh

No. 15-1-02828-8

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether defendant has waived any challenge to a comparability analysis of his prior out of state convictions when he knowingly, voluntarily and intelligently stipulated to his offender score and the appropriate remedy in the present case is to remand for correction of a scrivener's error?

2. Whether no error occurred when the trial court did not appoint a new attorney where defendant did not request a new attorney and no irreconcilable conflict with his defense attorney existed?

3. Whether defendant is unable to satisfy either prong of the ***Strickland*** test and show he received ineffective assistance of counsel when counsel represented him throughout the proceedings, made strategic decisions as part of his advocacy and the record is insufficient to show the stipulation to defendant's offender score was erroneous or prejudicial?

4. Whether appellate costs may be appropriate in this case if this Court affirms the judgment of the trial court when there is a realistic possibility of the defendant's future ability to pay these costs?

B. STATEMENT OF THE CASE.

On July 22, 2015, the Pierce County Prosecutor's Office charged DEDRIC GREER, hereinafter "defendant" with one count of murder in the second degree with aggravating circumstances. CP 1. The defendant was alleged to have murdered his girlfriend's 15 month old son. CP 2-4. Other minor children who were in the home observed the defendant grab the 15 month old by the neck, choke him and throw him down several times before the defendant pushed his fists into the child's stomach. CP 2-4. An autopsy concluded that the child had died from blunt force injury to the abdomen, likely frontal. CP 2-4. The medical examiner observed other injuries that caused him to believe the child had been suffering the same abdominal trauma for weeks. CP 2-4. The child also had multiple scars of varying ages, including parallel line injuries inflicted near the time of his death. CP 2-4. By the time the defendant and his girlfriend took the 15 month old to Mary Bridge Children's hospital, the child was in full arrest, rigor mortis had set in and doctors stated he had been dead for a while. CP 2-4.

On January 22, 2016, the State filed and defendant pleaded guilty to an amended information which removed the aggravating circumstances from the murder in the second degree charge. CP 18-27, 28; 1RP[1] 3, 11.

[1] The verbatim report of proceedings are transcribed in two volumes, each of which is paginated consecutively. The State will refer to the volumes like the defendant has done in his opening brief wherein the volume from 1/22/16 is referred to as "1RP" and the volume from 3/31/16 is referred to as "2RP".

Defendant stipulated that he had two prior comparable out of state convictions which made his offender score a 3 and his standard sentencing range 154 months to 254 months. CP 16-17; 1RP 12. The plea agreement indicated that the State would be recommending 254 months of confinement amongst other conditions and fines and that the "Defendant may argue for 154 months confinement – low end of the standard range." CP 21.

The sentencing hearing was held on March 31, 2016. 2RP 3. At the beginning of the hearing, the defendant asked to withdraw his plea due to a miscommunication with his attorney. 2RP 3. The court denied defendant's motion and despite the defense attorney's request for a sentence lower than the high end, the court sentenced defendant to 254 months of confinement. 2RP 4-11. The defendant filed a timely notice of appeal. CP 44.

C. ARGUMENT.

1. DEFENDANT KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY STIPULATED TO HIS OFFENDER SCORE THEREBY WAIVING ANY COMPARABILITY ANALYSIS CHALLENGE ON APPEAL. THE APPROPRIATE REMEDY IS TO REMAND FOR CORRECTION OF A SCRIVENER'S ERROR.

Generally, a defendant cannot waive a challenge to a miscalculated offender score where the claimed sentencing error is a legal error leading

to an excessive sentence. ***In re Personal Restraint of Goodwin***, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). But, a defendant waives a challenge alleging a miscalculated offender score if the alleged error involves an agreement to facts, later disputed, or involves a matter of trial court discretion. ***Goodwin,*** 146 Wn.2d at 874. The Washington Supreme Court has held that where a defendant fails to identify a factual dispute for the court's resolution and fails to request an exercise of the court's discretion, the defendant has waived a challenge to calculation of his offender score. ***State v. Shale***, 160 Wn.2d 489, 495, 158 P.3d 588 (2007) (*citing* ***State v. Nitsch***, 100 Wn. App. 512, 520-523, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030, 11 P.3d 827 (2000)). Specifically, "a defendant who stipulates that his out of state conviction is equivalent to a Washington offense has waived a later challenge to the use of that conviction in calculating his offender score." ***State v. Hickman***, 116 Wn. App. 902, 907, 68 P.3d 1156 (2003).

Defendant in the present case alleges that his offender score was miscalculated by arguing that his attorney improperly stipulated that his 2005 prior conviction out of Arkansas was factually and legally comparable to a Washington crime. But the record shows the defendant knowingly, voluntarily, and affirmatively stipulated to his offender score

to gain the benefit of the plea bargain and thus, he has waived any challenge to this claim.

The front page of the stipulation on prior record and offender score states "[t]he defendant further stipulates that any out of state convictions listed below are equivalent to Washington State felony convictions of the class indicated, per RCW 9.94A.360(3)/9.94A.525" and lists two prior convictions out of Arkansas, including the 2005 conviction. CP 16-17. Just below that, the document states "[t]he defendant stipulates that the above criminal history and scoring are correct, producing an offender score as follows, including current offenses, and stipulates that the offender score is correct." CP 16-17. Defendant's offender score was calculated as a 3 based on the calculation that his 2005 prior conviction added a single point to his offender score. CP 16-17. Just above the defendant's signature on this document, it also reads "[i]f sentenced within the standard range, the defendant further waives any right to appeal or seek redress via any collateral attack based upon the above stated criminal history and/or offender score calculation." CP 16-17. Defendant and his attorney both signed this document. CP 16-17.

In his statement on plea of guilty, the defendant initialed the bottom of a page which included a statement that the prosecuting attorney's statement of his criminal history was correct and complete. CP 19. Then during the hearing on defendant's plea of guilty, the following exchange also took place:

The Court: Just so the record is clear, I'm looking at the Stipulation on Prior Record and Offender Score. And the parties appear to have agreed on two out-of-state Arkansas offenses in terms of their classification and the points that they would create for this sentencing. Is that right?

[Prosecutor]: That's Correct, Your Honor.

The Court: Is that right [Defense Attorney]?

[Defense Attorney]: Yes, Your Honor.

1RP 12. Several weeks later during the defendant's sentencing hearing, the State discussed how defendant had some prior criminal history in Arkansas and there was no dispute by defendant or his attorney. 2RP 6. Defendant and his attorney also both signed the judgment and sentence which included the same criminal history and offender score calculation. CP 29-41.

From the record, there is no question that defendant and his attorney agreed and stipulated to the defendant's offender score which included the calculations involving the prior convictions in Arkansas. Defendant has waived any argument involving a claim that his prior conviction was not legally or factually comparable as a result of his stipulation. Rather, the reference to the statute in this claim of error really appears to be a scrivener's error which cites the current version of a statute as opposed to the one that was in effect at the time of defendant's conviction.

Defendant points to the statute cited under the language of his 2005 conviction for "FEL THEFT BY REC" which says "(=RCW 46.12.750)." CP 16-17. RCW 46.12.750 became effective on July 1, 2011, when its prior version, RCW 46.12.210 was recodified. *See* Laws 2010, ch. 161, § 1214. Both refer to the crime of "unlawful possession or transfer of a stolen vehicle or making false statement in certificate of title" in Washington. Thus, the State appears to have cited the current statute in the stipulation on prior record and offender score, rather than the one that was in effect during the time the defendant committed his crime. This merely amounts to a scrivener's error on the form and does not alter stipulation by defendant and his attorney that defendant had a prior felony that was comparable to a crime in Washington.

The most appropriate remedy in this case would be to remand for correction of the clerical error. *See* ***In re Personal Restraint Petition of Mayer***, 128 Wn. App. 694, 701-02, 117 P.3d 353 (2005) (On appeal, the remedy for a clerical error in a judgment and sentence is to remand the case so that the trial court can correct the error). This Court should remand with instructions to correct defendant's stipulation on prior offender score and judgment and sentence to reflect the relevant version of the statute, RCW 46.12.210, instead of the current version of the statute, RCW 46.12.750.

However, should this Court agree with defendant's analysis of the issue, the appropriate remedy would be to remand for a hearing where the

State may present the evidence of defendant's 2005 conviction from Arkansas and allow the court to engage in a comparability analysis with the relevant Washington statute, or the defendant may again stipulate to that fact.

2. THE TRIAL COURT DID NOT ERR BY NOT APPOINTING A NEW ATTORNEY WHEN DEFENDANT DID NOT REQUEST A NEW ATTORNEY AND NO IRRECONCILABLE CONFLICT WITH HIS DEFENSE ATTORNEY EXISTED.

A defendant in a criminal prosecution has a right to the assistance of counsel. U.S. Const. amend VI; WASH. CONST. art. 1, § 22 (amend. 10). Indigent defendants charged with felonies, or misdemeanors involving potential incarceration, are entitled to appointed counsel. ***McInturf v. Horton***, 85 Wn.2d 704, 705-07, 538 P.2d 499 (1975); CrR 3.1(d)(1). Whether an indigent defendant's dissatisfaction with his court-appointed counsel is meritorious and justifies the appointment of a new attorney is a matter within the discretion of the trial court. ***Horton***, 85 Wn.2d at 7005-07; ***State v. Wilkinson***, 12 Wn. App. 522, 524, 530 P.2d 340, *review denied*, 85 Wn.2d 1006 (1975).

To justify appointment of new counsel, a defendant "must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." ***Horton***, 85 Wn.

2d at 734. Attorney client conflicts justify granting a substitution motion only when counsel and defendant are so at odds as to prevent the presentation of an adequate defense. ***State v. Stenson***, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997), *certiorari denied*, 118 S. Ct. 1193, 523 U.S. 1008, 140 L. Ed. 2d 323 (1998). Simple lack of rapport between the attorney and client is not a basis for a withdrawal of counsel, even if both the attorney and the client would prefer the withdrawal. ***State v. Hegge***, 53 Wn. App. 345, 350, 766 P.2d 1127 (1989).

At the beginning of the sentencing hearing in the present case, the defendant asked to withdraw his plea because he did not feel like his lawyer was communicating with him. 2RP 3. The defendant said he felt there had been a miscommunication with his attorney as he claimed he had believed he was pleading to an ***Alford***[2] plea at the previous hearing. 2RP 3-4. He said he had told his attorney that what happened to the child was an accident and he had never planned on agreeing that he had done something to the child. 2RP 3-5. The trial court considered defendant's motion and discussed how he had gone through the plea with the defendant himself, specifically paragraph 11 which outlined the facts which made him guilty of the crime where defendant admitted to assaulting and recklessly inflicting substantial bodily harm on the child

[2] An ***Alford*** plea is where the accused technically does not acknowledge guilt but concedes there is sufficient evidence to support a conviction. It comes from ***North Carolina v. Alford***, 400 U.S. 25, 91 S. Ct. 160 27 L. Ed. 2d 162 (1970) and the holding was adopted by Washington in ***State v. Newton***, 87 Wn.2d 363, 552 P.2d 682 (1976).

thereby causing his death. 2RP 4-5. Finding defendant had not provided a legal basis to withdraw his plea, the court denied the defendant's motion. 2RP 3-5.

From this exchange, defendant argues that the trial court erred in failing to appoint a new attorney to represent him. But at no point during the proceedings did the defendant ask for a new attorney. The defendant only discussed the reasons he should be allowed to withdraw his plea. The fact that the defendant believed he had had a miscommunication with his attorney does not amount to a complete breakdown in communication between the attorney and the defendant necessary for the appointment of new counsel. Indeed, after the court took a short recess before sentencing, the defendant and his attorney spoke and the defense attorney represented to the court "[the defendant] had pent [*sic*] coming in here today and looking at all of this time. And he has since thought better of his decision today to try to withdraw his plea. Your honor, he has taken responsibility." 2RP 8-9. From the defense attorney's representation, it appears that whatever issue or miscommunication had occurred was resolved and not a true conflict of interest or irreconcilable difference. The trial court was not required to appoint a new attorney for the defendant when the defendant never requested one, the alleged issue did not warrant the appointment of new counsel and the record reflects that the issue stemmed from a place of buyer's remorse rather than a true conflict of interest between the defendant and his attorney.

Defendant also argues however that because he was forced to bring the motion to withdraw his plea by himself without any assistance from his attorney, he was denied his constitutional right to an attorney. Courts presume that a defendant was denied his constitutional right to counsel when counsel "[is] either totally absent or prevented from assisting the accused during a critical stage of the [criminal] proceeding." ***United States v. Cronic,*** 466 U.S. 648, 659 n. 25, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). An outright denial of the right to counsel is presumed prejudicial and warrants reversal without a harmless error analysis. ***State v. Harell***, 80 Wn. App. 802, 805, 911 P.2d 1034 (1996).

The record in the present case does not reflect that the defense attorney refused to assist the defendant in bringing the motion. The defense attorney told the court "Your Honor, Mr. Greer has informed me that he would like to withdraw his plea. And with that, I will turn it over to Mr. Greer. I'm not precisely sure what the basis is for that motion." 2RP 3. The record reveals that the defendant told the attorney he wanted to withdraw his plea and likely asked to address the court. There was no outright denial of the right to counsel as nothing in the record in the present case suggests the defense attorney ever refused to assist the defendant and the defense attorney was present throughout the proceedings. Rather, it appears the defendant himself may have wanted to

bring the motion before the court in a form of hybrid representation[3]. In such a situation, the defendant cannot claim he was denied the right to counsel as it would have been his decision and request to bring the motion without counsel.

In addition, the defendant is unable to show he was denied his constitutional right to an attorney when his attorney did not move to withdraw the plea where there was no legal basis to make the motion. An attorney has no duty to argue frivolous or groundless matters before the court. ***State v. Stevens***, 69 Wn.2d 906, 908, 421 P.2d 360 (1966). If the defense attorney believed the defendant had had a legitimate basis to make the motion to withdraw the plea, he likely would have brought a motion before the court. But, in this case, as the court correctly observed, there was no legal basis to support the withdrawal of the defendant's plea as the defendant's plea was knowingly, voluntarily, and intelligently entered. Thus, the defense attorney's decision not to advance a frivolous motion was not a denial of the constitutional right to counsel.

Nevertheless, should this Court disagree, defendant's remedy would not be the withdrawal of his guilty plea as defendant claims. *See* Brief of Appellant at 26. The remedy would be to remand for a new

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[3] Although a defendant has no absolute constitutional right to proceed to trial with counsel and to simultaneously actively conduct his own defense, a trial judge has the discretion to permit such representation. *See* ***State v. Hightower***, 36 Wn. App. 536, 541, 676 P.2d 1016, *review denied*, 101 Wn.2d 1013 (1984).

hearing with new counsel on a motion to withdraw the defendant's plea should defendant still seek to do that.

3. DEFENDANT IS UNABLE TO SATISFY EITHER PRONG OF THE ***STRICKLAND*** TEST AND SHOW HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." ***United States v. Cronic***, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." ***Kimmelman v. Morrison***, 477 U.S. 365, 374, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney's performance was deficient, and (2) that he or she was prejudiced by the deficiency. ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); ***State v. Hendrickson***, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to

trial strategy or tactics. ***State v. Garrett***, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. ***State v. Thomas***, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland***, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

> What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (C.A. 9, 1995).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. ***State v. Ciskie***, 110 Wn.2d 263, 284, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena

necessary witnesses. *Id.* An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. ***State v. Carpenter***, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within a wide range of professionally competent assistance. ***Strickland***, 466 U.S. at 489; ***United States v. Layton***, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 488 U.S. 948 (1988). When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection was meritorious, but also that the verdict would have been different if the motion or objections had been granted. ***Kimmelman***, 477 U.S. at 375; ***United States v. Molina***, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. ***Cuffle v. Goldsmith***, 906 F.2d 385, 388 (9th Cir. 1990).

A defendant must demonstrate both prongs of the ***Strickland*** test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. ***State v. Thomas***, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

a. Defense counsel represented defendant throughout the proceedings.

Defendant first claims that his attorney was ineffective by refusing to represent him during the motion to withdraw his plea at the beginning of the sentencing hearing. Brief of Appellant at 9-12. Defendant claims that his attorney "abandoned" him, but there is nothing in the record to support that claim. Rather, the record actually reflects that it appears the defendant himself wanted to make the motion and his defense attorney allowed him to tell the court what he wanted to say. *See* 2RP 3. The defense attorney told the court that the defendant had "informed" him he wanted to withdraw his plea and that he was unsure of the basis for the motion. 2RP 3. The defendant then spoke to the court, explaining why he felt he should be allowed to withdraw his plea. 2RP 3-4.

There is absolutely nothing in the record which supports the claim that the defense attorney refused to make the motion or stopped representing the defendant at any point. The defendant never said that his attorney refused to assist him or would not make the motion for him. 2RP 3-4. Rather, the record suggests the defendant himself wanted to address the court and the defense attorney complied with the defendant's request. The defense attorney remained next to the defendant while the defendant made the motion. 2RP 3. He then spoke with the defendant about the motion during a recess and represented back to the court that the defendant had thought better of his motion to withdraw. 2RP 8-9. Under the Rules

of Professional Conduct, attorneys have a duty of candor toward the tribunal which precludes them from making a false statement of a material fact to the tribunal. RPC 3.3. The suggestion that the defense attorney's remarks did not represent the defendant's position is unjustified in light of RPC 3.3 and the fact that the defendant himself later spoke to the court and made no mention of the defense attorney misrepresenting how he felt at that point. 2RP 10. Defendant's claim that his attorney abandoned him during the proceedings is completely unsupported by the record and defendant's claim of ineffective assistance of counsel on this point is without merit.

b. Defense counsel's sentencing argument was a strategic decision based upon the facts of this case.

Defendant next claims that his attorney was ineffective by not meaningfully advocating for his client and failing to argue for the low end of the sentencing range as outlined in the plea agreement. Brief of Appellant at 12-17. The plea agreement actually stated that "Defendant **may** argue for 154 months confinement – low end of the standard range." CP 21 (emphasis added). It did not require the defense attorney to argue for the low end of the standard range; it merely gave the defense attorney the option to argue for that if he believed he could legitimately make an argument for the low end of the standard range.

In this case however, the defense attorney's decision to request something less than the high end of the standard sentencing range was clearly a tactical decision entirely appropriate in light of the facts of the case. Defendant pleaded guilty to murdering his girlfriend's 15 month old son after physically assaulting him. CP 18-27. The other children in the home who witnessed the assault observed the defendant grab the 15 month old by the neck, choke him and throw him down several times before the defendant pushed his fists into the child's stomach. CP 2-4. The autopsy revealed the child had died from blunt force injury to the abdomen, likely frontal and showed the child also had multiple scars of varying ages, including parallel line injuries inflicted near the time of his death. CP 2-4. The medical examiner also observed other injuries that caused him to believe the child had been suffering the same abdominal trauma for weeks. CP 2-4. The defendant and his girlfriend waited so long to even take the child to the hospital that by the time he arrived, the 15 month old was in full arrest, rigor mortis had set in and doctors stated he had been dead for a while. CP 2-4.

To ask for the low end of the sentencing range in such a situation where the court is aware of these facts would have been disingenuous and likely served to harm the defendant more than help him. Instead, the defense attorney, recognizing the heinous nature of the acts and lack of remorse in the defendant's actions immediately following the child's death, made a strategic decision to ask the court to be the entity that

initiates a change in the defendant's life by showing mercy on the defendant where the defendant had shown none on the child. He told the court how during the pendency of the case, the defendant had expressed great regret for the role he played in the death of the child and that he never intended for the child to die. 2RP 8. He pointed out that the defendant is truly sorry for what he had done, he used poor judgment and he took responsibility by pleading guilty. 2RP 8-9. The defense attorney then asked the court to exercise some compassion and show some mercy on the defendant in the hopes that he would learn something from such action and develop his own sense of compassion and mercy which he did not appear to have that day. 2RP 8-9.

The defense attorney in this case was faced with a difficult situation where he could not hide from the extremely bad facts that as he acknowledged were "rife with all of the emotional upheaval that call[ed] out for a sentence higher than the low end." 2RP 8. His decision to acknowledge the defendant's wrongs and lay him at the mercy of the court was strategically done in the hopes that the court would not impose the high end of the standard range which the facts in this case so clearly warranted. To plead for the low end of the standard range in a case like this ran the risk of being offensive and could insult the court such that it would not even consider a lesser sentence. The strategy employed by this defense attorney at least gave the defendant the most realistic opportunity

that the court would consider something other than the high end. Indeed, in imposing its sentence, the court stated:

> I'm confounded by the brutality that gets visited on children, but a 14-month-old baby beaten to death and then left? Rigor mortis had set in by the time this child got medical help. I would be impossible not to know that the child was in extremis or dead, but nothing was done. So it's not just the brutality of the crime itself. It's the callous neglect after the fact. I appreciate your desire for this Court to show some mercy and some leniency in this matter, [defense attorney], but I just in good conscious cannot.

2RP 11. Defendant's attorney was in no way ineffective in making such a strategic argument.

Regardless, even assuming defense counsel's performance was somehow deficient, defendant is unable to satisfy the second prong of ***Strickland*** and show prejudice. As the Court of Appeals Division Three noted:

> We discuss prejudice to stress that an allegedly unsuccessful or poor quality sentencing argument alone is unlikely to result in demonstrable prejudice because of the near impossibility of showing a nexus between the argument and the eventual sentence. We must be persuaded the result would have been different. [*State v.*] *McNeal*, 145 Wn.2d [352,] 362, 37 P.3d 280 [2002]. A standard range sentence is a matter of broad trial court discretion. Argument merely attempts to influence the court's exercise of its sentencing discretion. A failed attempt alone does not show prejudice, or satisfy the nexus requirement since we must presume adequately performed argument.

State v. Goldberg, 123 Wn. App. 848, 853, 99 P.3d 924 (2004). Defendant is unable to show his attorney's performance was deficient, let alone prejudicial given the facts of this case.

c. Defendant is unable to show his counsel was ineffective in stipulating to his prior convictions in Arkansas.

Defendant argues that his attorney was ineffective for erroneously stipulating to two prior convictions out of Arkansas. The first conviction relates to his "FEL THEFT BY REC" conviction from 2005. CP 16-17. As discussed previously in this brief, "[=RCW 46.12.750]" is located on the form just below the crime. This is the citation to the current version of the statute for the comparable crime, not the one that was in effect at the time defendant committed the crime in 2005, which would have been RCW 46.12.210. This appears to be nothing more than a scrivener's error with the State citing to the incorrect version of the statute. *See* Section 1. Furthermore, there is a presumption that counsel is competent. ***State v. Piche***, 71 Wn.2d 583, 591, 430 P.2d 522 (1967). The fact that the State cited the prior version of the statute in the form does not indicate in any way that defense counsel did not properly review and compare the appropriate version in his analysis. Defendant is unable to show his counsel was deficient and failed to conduct the appropriate comparability analysis from the facts that are before this Court at this time.

Defendant also argues that his counsel erroneously stipulated about defendant's prior conviction from 2014 labeled "SEX ASLT 2" because it was comparable to a far broader out-of-state conviction. In his brief, defendant engages in a comparability analysis regarding an Arkansas statute that he presumes is the statute defense counsel and the State agreed was comparable a Washington statute. Brief of Appellant at 20-24. But, the specific Arkansas statute is not named anywhere in any of the documents that were before the sentencing court or this Court on appeal. As such, it is only an assumption that the statute defendant engages in an analysis of is the statute the parties were in fact conducting a comparability analysis with.

In addition, even if the discussed statute is correct and it is determined to be broader than the Washington state statute, this still does not show that defense counsel's stipulation was deficient. In a comparability determination, if the elements of the out-of-state crime are different or broader, the sentencing court determines whether the defendant's conduct would have violated the comparable Washington statute. ***State v. Olsen***, 180 Wn.2d 468, 473, 325 P.3d 187 (2014). In analyzing this factual prong, the court may consider facts that were admitted, stipulated to or proved beyond a reasonable doubt. *Id.* at 478 (*citing* ***State v. Thiefault,*** 160 Wn.2d 409, 415, 158 P.3d 580 (2007)).

The comparability analysis in defendant's brief is limited to a legal analysis of the comparable statutes. But as case law recognizes, a court

conducting in a comparability analysis may go beyond that. Likewise, defense counsel in the present case may have had documents which under the factual analysis would have made defendant's 2014 conviction in Arkansas comparable to a Washington crime. But, because those documents are not in the record before this Court, defendant cannot show that his attorney's performance was deficient simply by a legal analysis of the presumed relevant Arkansas statute. Defendant is unable to show his attorney's performance was deficient by stipulating to the prior 2014 conviction based on the record that is before this court.

Additionally, in the case of both stipulations, to prove a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was not only deficient, but that the deficient performance prejudiced the defense. ***State v. Bowerman***, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Prejudice is established if there is a reasonable probability that, except for counsel's errors, the result of the proceeding would have been different. ***State v. McFarland***, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). In the present case, defendant is unable to show prejudice because he cannot show that his offender score would have been calculated differently absent either of the stipulations. There is no evidence in the record which contains the documents defense counsel and the State were relying on in conducting their comparability analysis. Without knowing what the evidence was and what it contained, the defendant is unable to show that his attorney erroneously stipulated to his

prior convictions, let alone that this would have would have caused defendant's offender score to have been calculated differently.

4. APPELLATE COSTS MAY BE APPROPRIATE IN THIS CASE IF THE COURT AFFIRMS THE JUDGMENT OF THE TRIAL COURT AND SHOULD BE ADDRESSED IF THE STATE WERE TO PREVAIL AND WERE TO SEEK ENFORCEMENT OF COSTS.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. ***State v. Blank***, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); ***State v. Mahone***, 98 Wn. App. 342, 989 P. 2d 583 (1999). The award of appellate costs to a prevailing party is within the discretion of the appellate court. RAP 14.2; ***State v. Nolan***, 141 Wn.2d 620, 8 P.3d 300 (2000).

In ***Nolan*** the defendant began review of the issue by filing an objection to the State's cost bill. *Id.*, at 622. As suggested by the Supreme Court in ***Blank***, 131 Wn.2d at 244, this is an appropriate manner in which to raise the issue. The procedure invented by Division I in ***State v. Sinclair***, 192 Wn. App. 380, 389-390, 367 P. 3d 612 (2016), prematurely raises an issue not before the Court. If the defendant does not prevail, and if the State files a cost bill, the defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill.

Regardless, defendant in the present case may have the future ability to pay the costs of his appeal. Recently, in ***State v. Caver***, 1985

Wn. App. 774, 381 P.3d 191 (2016), Division One of this Court directly addressed the situation where a defendant did not have the ability to pay appellate costs at the time of appeal, but was likely to have the ability to pay appellate costs in the future. ***State v. Caver***, 195 Wn. App. at 786. Division One found there was essentially a two part-test to determine the ability to pay appellate costs: (1) the ability to pay the cost of appeal at the time of appeal; and (2) the future ability to pay for the costs of appeal. *Id.* In ***Caver***, while the defendant was indigent at the time of appeal, because he was only 53 years old and had a relatively short sentence of incarceration, under the second part of the test, the court found there was a "realistic possibility" Caver would be able to pay costs in the future. *Id.* at 787 (*quoting* ***State v. Sinclair***, 192 Wn. App. at 393).

In this case at the time of the plea in January of 2016, the defendant was 31 years old. CP 18-27. He will at most be serving a total prison term of 254 months, inclusive of the time that has already been served prior to conviction and while this appeal is pending. As such there is a "realistic possibility" the defendant here will be able to pay costs in the future when he is released from incarceration at the age of, at his oldest, 53 years old.

Even if the court decides to award the State costs, this does not leave the defendant without a recourse if in the future he cannot pay. RCW 10.73.160(4) provides that as long as a defendant is not in contumacious default of payments, they may petition the sentencing court

for remission of any unpaid costs if such would impose a hardship on the defendant or their immediate family. The sentencing court may then either remit the costs in all or part or modify such payments under RCW 10.01.170.

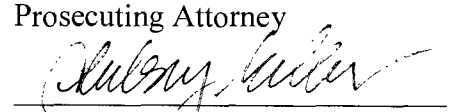
If the Court decided to excuse every indigent defendant from payment of costs, such a policy would create a heavy burden on law-abiding taxpayers. Hence, this Court should address the issue of appellate costs only if the State prevails and seeks enforcement.

D. CONCLUSION.

The State respectfully requests this Court affirm defendant's conviction and sentence for the foregoing reasons, but remand for correction of the scrivener's error on the Stipulation on Prior Record and Offender Score which erroneously cites to the prior version of the statute so that "RCW 46.12.750" is changed to reflect "RCW 46.12.210," the version of the statute that was in effect at the time of defendant's conviction in Arkansas.

DATED: December 20, 2016

MARK LINDQUIST
Pierce County
Prosecuting Attorney



CHELSEY MILLER
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WSB # 42892

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

Date Signature

PIERCE COUNTY PROSECUTOR

December 20, 2016 - 10:22 AM

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